IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 75

FORD MOTOR COMPANY,

Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON, AND FRANK G. THOMPSON, AS AND CONSTITUTING THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Respondents.

RESPONDENTS' BRIEF

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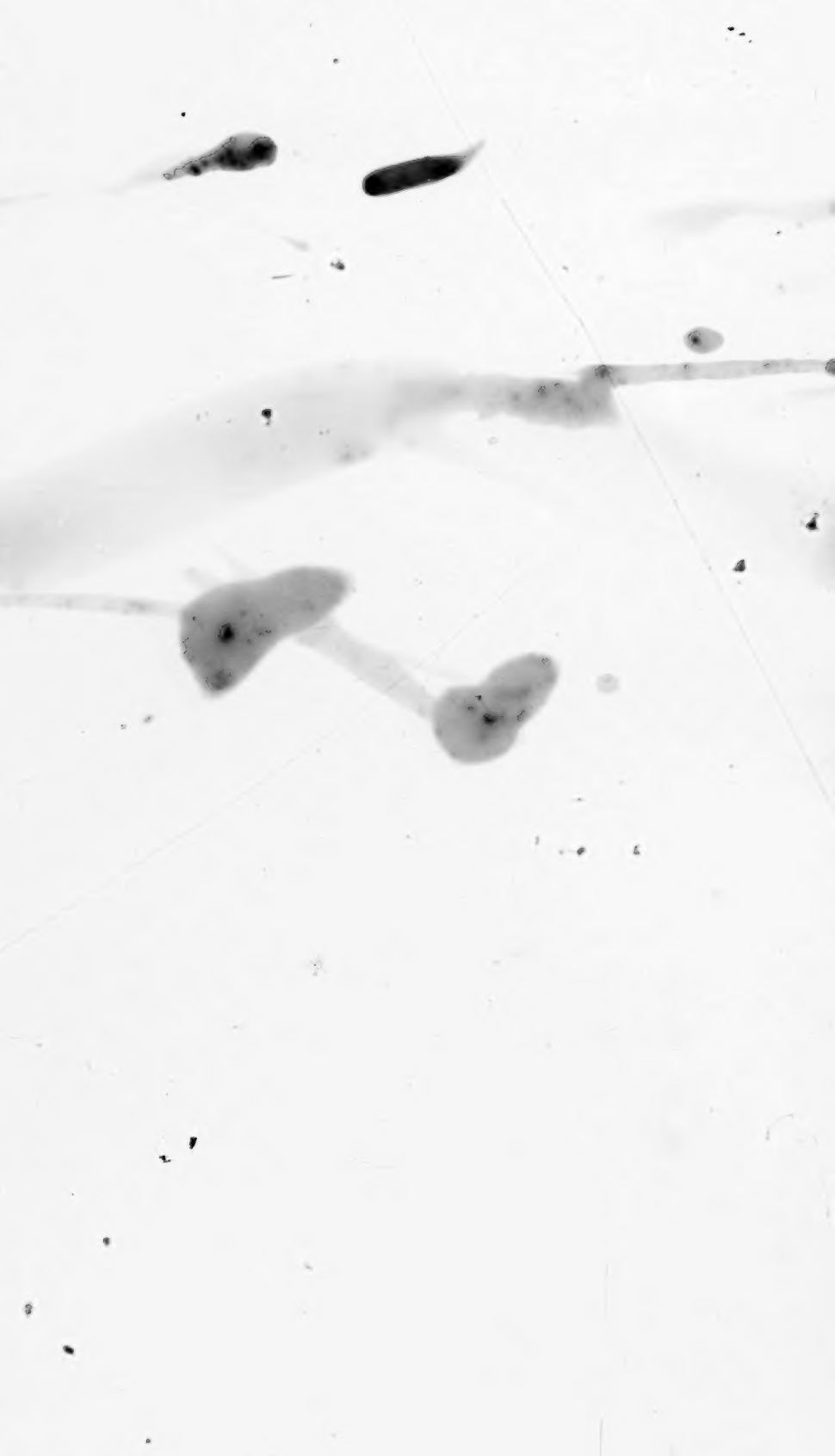

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RESPONDENTS' BRIEF

OPINION BELOW

The United States District Court for the Southern District of Indiana, Indianapolis Division, delivered no opinion; its final decree is found at (R. 82). The opinion of the Circuit Court of Appeals of the United States for the Seventh Circuit (R. 98-103) is reported in 141 Fed. (2d) 24.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered on March 4, 1944 (R. 98). The Petition for a Writ of Certiorari was filed on May 3, 1944, and was served on respondents on May 4, 1944. The Appellate jurisdiction of this court depends on section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U. S. C. A. 347. Certiorari was granted on May 29, 1944.

Since certiorari was granted, this court decided *Great Northern L. Ins. Co. v. Read* (April 24, 1944), 322 U. S. 47, 64 S. Ct. 873. This decision has caused respondents to question the jurisdiction of the trial court and, consequently, of this court.

1. Facts on Which Jurisdiction Depends.

This action was brought against the Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as and constituting the Department of Treasury of the State of Indiana (R. 2), by the petitioner, a Delaware corporation (R. 2). The complaint discloses that the defendant-respondent, Department of Treasury, is an executive department of the State of Indiana (R. 2) in which is vested the enforcement of the Indiana Gross Income Tax Act (R. 2). The complaint alleged that the plaintiff-petitioner had been improperly charged with Gross Income Tax (R. 3) and asked refund thereof (R. 11). The answer to the complaint was filed by the Attorney-General of Indiana (R. 25) and was addressed to the merits of the action (R. 11-25). In fact, no objection has heretofore been made to the jurisdiction of the trial court, of the Circuit

Court of Appeals, or of this court. The answer admitted the capacity in which the parties sued and were sued (R. 12).

The amendment of and supplement to the complaint thereafter filed repeated the allegations as to the capacity of the parties (R. 27-28) and sought a recovery upon an account stated (R. 30). The answer to this amendment and supplement was likewise filed by the Attorney-General, (R. 39), was addressed to the merits (R. 34-39), and admitted the capacities in which the parties sued, and were sued, (R. 33), and in addition disclosed that the defendants, Townsend, Robertson and Thompson, were the Governor, Treasurer and Auditor of State, respectively (R. 33).

The complaint (R. 2) and supplemental complaint (R. 27-28) alleged, and the answer (R. 12) and answer to supplement (R. 33) admitted, diversity of citizenship and presence of a federal question as the basis for jurisdiction.

The findings of fact and conclusions of law reported by the Special Master were adopted by the District Court (R. 40). The findings repeat the allegations of the complaint as to the capacity of the parties at the time suit was brought (R. 41) and jurisdiction (R. 41, 42).

2. Application of the 11th Amendment.

In every instance where the individual defendants are named or mentioned in the record they are particularly described "*as and constituting the Department of Treasury of the State of Indiana,*" which is named as a party and described as an executive department of the State of Indiana. It is disclosed on the face of the complaint and throughout the record that these defendants have no individual interest in the controversy but that, on the contrary,

the action seeks a recovery of money from the state treasury that had been collected from the plaintiff-petitioner and paid into the general fund of the State. *Indiana Gross Income Tax Act of 1933, as amended*, sec. 21, Appendix A, *post*, p. 41. This action then was an action by a nonresident against the State of Indiana within the prohibition of the 11th Amendment to the constitution and the question is one of jurisdiction of the Federal courts. *In re Ayers* (1887), 123 U. S. 443, 489. The Department of Treasury is named defendant as an executive department of the State exercising the purely political function of collecting taxes. The persons named as parties defendant were not named as individuals, but only to the extent that they constituted the Department of Treasury. The first paragraph of complaint (R. 2-11) was predicated upon a statutory refund procedure which provides for payment of any judgment out of any unappropriated monies in the general funds of the State. The supplemental paragraph II of the complaint (R. 27-30) states a cause of action upon an account stated and the only relief demanded is a personal judgment against the defendant, Department of Treasury of the State of Indiana (R. 30), an executive department exercising only political functions (R. 27).

It is, therefore, apparent on the record that this action is in form and substance an action against the State of Indiana in its sovereign capacity. *Great Northern L. Ins. Co. v. Read, Commr.* (April 24, 1944), 322 U. S. 47; *Smith v. Reeves* (1900), 178 U. S. 436; *In re Ayers* (1887), 123 U. S. 443, 489; *Shoemaker v. Board* (1871), 36 Ind. 175, 186. Under the provisions of the 11th Amendment to the constitution, this action was not cognizable by a Federal Court unless the State may be deemed to have consented to it. *Great Northern L. Ins. Co. v. Read* (1944), 322 U. S. 47.

3. Was There Express Consent by the State to Be Sued in Federal Court?

The constitution of Indiana authorizes the legislature to make provision by general law for suits to be brought against the State and prohibits special acts authorizing such suit. *Article 4, Section 24, Appendix B, post*, p. 45. Under this provision only the legislature may grant such consent.

Prior to the enactment of the Gross Income Tax Law, the only law of Indiana concerning a general right to sue the State restricted the venue to the Superior Court of Marion County (2 Burns' Indiana Statutes, § 4-1501, *Appendix B, post*, p. 45), and the cause of action to suits upon contract.

In the Gross Income Tax Law of 1933, *Appendix A, post*, p. 41, Section 14, the legislature provided an administrative remedy for refund of taxes erroneously paid. Upon denial of such refund claim by the administrative officers, the taxpayer is authorized to bring suit for such refund. This authorization of suit is as follows:

> "Any person improperly charged with any tax provided for under *the terms of* this act, and required to pay the same, may recover any amount *thus* improperly collected, together with interest, in any proper action or suit against the department *in any court of competent jurisdiction;* and the circuit *or superior* court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any *tax* improperly collected: Provided, however, That no court shall entertain such a suit, unless the taxpayer shall show that he has *filed a petition for refund with the department*, as hereinabove provided, within one year

prior to the institution of the action: * * *."
(Italics supplied.)

This section is clearly inapplicable to paragraph two of the complaint herein as that paragraph is a suit upon an account stated upon which no refund claim was filed. It is an action against the State upon contract which the general act required to be submitted to the Marion Superior Court sitting as a court of claims. The State at no time has consented that such an action be filed in the Federal courts and, consequently, the District Court had no jurisdiction whatever over that action. The suability of the State is restricted to the terms of its consent. *Great Northern L. Ins. Co. v. Read* (1944), 322 U. S. 47.

Paragraph one of the complaint is clearly governed by the refund provisions of the Gross Income Tax Act above quoted and the jurisdiction of the District Court depends upon a construction of those provisions. The inquiry is as to whether they constitute a consent by the State to be sued in the Federal Court.

At first blush the phrase "in any court of competent jurisdiction" would appear to be inclusive and decisive. However, jurisdiction includes not only territorial jurisdiction, but also jurisdiction over the person and subject matter. Thus the State's consent is limited to courts having jurisdiction over causes of action against a state and over the person of the defendant. In the face of the 11th amendment, the legislature could hardly have then understood that the Federal Court was a court of competent jurisdiction over claims against the State for that amendment negatives the existence of jurisdiction over that subject-matter. *State ex rel. v. Board* (1875), 49 Ind. 457, 459.

Furthermore, immediately following this phrase, the legislature states specifically the courts which shall have original jurisdiction of such an action, mentioning only the Circuit and Superior Courts of the taxpayer's residence. In the original act only the Circuit Court was mentioned. The phrase "in any court of competent jurisdiction" first appeared in 1937 when the legislature added the Superior Courts of taxpayer's residence as courts having jurisdiction over the subject-matter. It is entirely reasonable to infer that the legislature had in mind that the courts of competent jurisdiction were those upon which it then conferred jurisdiction and that the phrase "in any court of competent jurisdiction" was added in 1937 because then, for the first time, more than one court was vested with competent jurisdiction. Such mention of a particular state court has been held to warrant an inference that the legislature did not intend to consent to a suit in Federal Court. *Smith v. Reeves* (1900), 178 U. S. 436. This is merely the application of the rule of statutory construction that the express mention of one thing implies the exclusion of others. *Branson v. Studebaker* (1892), 133 Ind. 147; *Princeton Coal Co. v. Fettinger* (1916), 185 Ind. 675.

It may be argued that the provision granting jurisdiction to the Circuit and Superior Courts of the county of taxpayer's residence or location concerned merely the venue. Two answers suggest themselves. First, unless this be a grant of jurisdiction, the Circuit and Superior Courts mentioned would be wholly devoid of jurisdiction over the subject-matter of these suits and the statute is in terms a grant of jurisdiction. Second, there is no statute placing the venue in any other county which required modification in order to place the venue in the county of taxpayer's residence.

No objection was made in either the trial or appellate courts upon this ground and the question of jurisdiction over this action against the State was not mentioned or decided. Several previous actions of a similar nature have been prosecuted to final judgment in the federal courts by other taxpayers without objection by the State. If it be within the power of the administrative and executive officers of the State to waive the State's immunity it must be conceded that they have done so in this action. The constitutional provision which grants the power to the legislature to make such waiver restricts its exercise to a provision therefor by general law. *Indiana Constitution, Article 4, Section 24, Appendix B, post*, p. 45. If the legislature may act only by general law and is prohibited from granting a waiver in a specific case, certainly the administrative and executive officers cannot be empowered to grant or withhold waivers in individual cases as their discretion may dictate.

The taxpayer seeking to recover from the State must strictly pursue the remedy granted. *Shoemaker v. Board* (1871), 36 Ind. 175, 188; *Maas & Waldstein v. U. S.* (1930), 283 U. S. 583, 589; *Paul, Federal Estate and Gift Taxation* (1st ed., 1942), p. 915. Appellant, by suing in Federal Court, has not done so.

4. Appellee Has Not Performed the Conditions Precedent to Suit.

This action is a suit for refund of tax alleged to have been unlawfully collected from the petitioner. It is required as a condition precedent to such suit that:

> "• • • no court shall entertain such a suit, unless the taxpayer shall show that he has filed a

petition for refund with the department as hereinabove provided, * * *."

Previously, in the same section, it is required that:

> "In such petition, he shall set forth the amounts which he claims should be refunded, *and the reasons for such claim.*" (Italics supplied.)
>
> 11 Burns' Indiana Statutes (1943 Replacement), § 64-2614, Appendix A, *post*, p. 41.

The petitioner did not file any claim for refund on the theory of account stated, nor upon the ground that it was non-taxable under section 2 of the Gross Income Tax Act (R. 66). While the court below found as a fact that the claim for refund was sufficient as to form (R. 66), it also found as a fact the specific grounds which were presented in such claim (R. 68).

The petitioner has not complied with the terms and conditions placed by the State upon its waiver of immunity and cannot claim such waiver. *Maas & Waldstein Co. v. U. S.* (1930), 283 U. S. 583, 589; *Shoemaker v. Board* (1871), 36 Ind. 175, 188.

This proposition was argued in respondents' brief opposing the petition for certiorari (p. 14, ff.) and will not be here extended.

QUESTIONS PRESENTED

1. Where petitioner delivers automobiles to a carrier outside the State, charges prepaid, for delivery to dealers within the State, under a contract requiring payment of the purchase price before delivery and before transfer of

title, such dealers being restricted and supervised by petitioner in the conduct of their business, within the State, are the receipts from such sales received from a source within the State?

2. Whether an action against a state upon an account stated can be predicated solely upon an outline of legal principles formulated by the hearing judge of an executive department of the state, which outline of legal principles was referred to the auditors of that department for an audit of the taxpayer's books and for the computation of the amount to be refunded, where:

(a) Such audit report approved a smaller amount of refund to the taxpayer than the taxpayer claimed, such audit report being approved by the head of the department who was by statute granted the sole power to act officially for the department.

(b) No amount of tax refund was stated in the outline of legal principles upon which the taxpayer bases his claim of an account stated.

(c) None of the officers involved had any statutory authority to enter into any compromise or other contract, on behalf of the State.

(d) The trial court specifically found the terms of the agreement between the parties and that respondents had complied with that agreement.

STATUTES INVOLVED

1. The first question presented, *supra*, involves taxes for the years 1935, 1936 and 1937. As to the first two years, this question involves a construction of section 2

of the Gross Income Tax Act of 1933 which is set out in Petitioner's Brief in Appendix A at page 41. As to 1937, the question involves an interpretation of such section 2 as amended in 1937, which amended section is set forth in Petitioner's Brief in Appendix A at p. 41.

STATEMENT

Upon petitioner's original (R. 2) and supplemental (R. 26) complaints and respondents' answers thereto (R. 11 and 31) the court stated its Findings of Fact (R. 41). The evidence in the cause has not been brought into the record (R. 90). Upon these Findings, the court stated its conclusions of law (R. 81) and rendered judgment for the respondents (R. 82), which judgment was affirmed by the Circuit Court of Appeals (R. 98-103).

The pertinent facts contained in the Findings of the court may be summarized as follows:

1. This Litigation. On July 1, 1938, the respondent, Department of Treasury of the State of Indiana, pursuant to the Indiana Gross Income Tax Act, made a proposed assessment upon the petitioner (R. 63). After due protest (R. 65) and final assessment (R. 65) petitioner paid such assessment (R. 65). Within the time and under the procedure specified by section 14 of the Indiana Gross Income Tax Act (Appendix A, *infra*, p. 28) petitioner filed with respondents a petition for refund of the taxes so paid (R. 66), which petition was in proper form (R. 68), and in which petition petitioner specifically stated the reasons for its such claim as follows (R. 66):

> "(1st) That the receipts were from commerce between the states, and under Section 8, Article I

of the Constitution of the United States, the tax was void;

"(2) That the receipts were from transactions completed outside of the State and were not taxable under Section 1 (m) of the Gross Income Tax Act as amended, nor under Regs. 191 and 193 under the 1933 Act, and further, if such receipts were taxable, then the Act was in conflict with the Fourteenth Amendment to the Constitution of the United States;

"(3rd) All of the tax assessed on Class A sales for the year 1935 and that portion of tax for the year 1936 collected for the first three quarters was not assessed 'at any time within two years after the time when the return covering such gross income was filed, and after due notice by registered letter, to the taxpayer,' and such assessment for the aforesaid periods was therefore void. Plaintiff's refund petition also set forth as Exhibits schedules demonstrating certain errors in the original audit figures of the figures of the defendants which were attached to the notice of proposed assessment of July 1, 1938."

Thereafter, on June 7, 1939, petitioner filed its complaint in this cause for such refund. The complaint alleged the above facts and after alleging the method by which it did business stated as its grounds for recovery in regard to Class A sales (R. 7-8) that the taxation of such receipts was prohibited by the commerce clause of the Constitution of the United States; that such receipts were derived from activities, business and sources outside the State of Indiana under the provisions of section 2 of the Gross Income Tax Act of 1933 and as amended in 1937; and that if construed to be taxable under the Gross Income Tax Act then the Act is in violation of the Fourteenth Amendment of the Constitution of the United States. To this complaint the

respondents addressed an answer of admission and denial (R. 11-35).

On October 27, 1941, the petitioner filed an amendment of and supplement to their complaint, amending Paragraph I of their complaint in one particular (R. 26-27) and adding a second paragraph of complaint (R. 27-30), which second paragraph alleged that after the filing of this cause the parties agreed to a review of the decision upon the claim for refund theretofore filed, and that for that purpose petitioner filed with the respondents a request for reconsideration and that respondents acquiesced in such request for reconsideration and upon reconsideration agreed with the petitioner that the transactions taxed were not taxable and notified petitioner that the claim for refund had been allowed; that petitioner acquiesced in such allowance and ruling and that by reason of such allowance and acquiescence an account was stated between the parties. To this amended and supplemental complaint the respondents filed answer (R. 31-39) denying any account stated and setting up additional facts concerning the negotiations between the parties.

The cause was referred to a special master (R. 40) who made report which was adopted by the court as its Findings of Fact (R. 40).

2. The Contract Between the Petitioner and Its Dealers in General. Each dealer to whom the petitioner sells its products enters into a contract with the petitioner the form of which is set forth in the Findings of Fact (R. 43-49). By this contract the petitioner agrees to sell and the dealer agrees to purchase petitioner's products F. O. B. Detroit, Michigan, at the prices from time to time determined by the company. Sales are to be upon a cash basis

only and it is expressly provided that full payment precede delivery (Clause 2, R. 44), and that title remain in petitioner until the price is paid (Clause 6, R. 45). In addition to the payments specified, the company is permitted to add an amount determined by it for freight, packaging and other handling expense and any taxes imposed by the dealer's state (R. 44). The dealer agrees to comply with the company's requirements in the operation of its business and its method of selling to the consumer. The method of ordering is specified (R. 46-47), provision is made for termination (R. 47-48), construction of the contract is to be by the law of Michigan (R. 48), assignment without consent is forbidden (R. 48), modification variance or cancellation is prohibited except by instrument in writing executed by certain executive officers of the petitioner (R. 48), and it is agreed that the contract states the full agreement between the parties (R. 48).

3. **Specific Provisions of the Contract Upon Which Respondents Rely.** The contract (Clause 2, R. 44) specifically provides:

> "Payment by dealer is to be in cash before delivery, or by paying sight draft attached to Bill of Lading, including exchange."

The contract further provides (Clause 6, R. 45):

> "Title to all company products until actually paid for by dealer shall be and remain in company; but regardless of title remaining in company or having passed to dealer all shipment shall be at dealer's risk from the time of delivery to carrier at place of shipment; * * *."

Clause 9 (h) provides (R. 48):

> "The terms of this agreement may not be enlarged, varied, modified or cancelled by any agent or representative of company, except by an instrument in writing executed by the President, Vice-President, Secretary or Assistant Secretary of company and company will not be bound by any alleged enlargement, variation, modifications, or agreement not so evidenced."

4. Petitioner's Manufacturing and Sales Organizations. Petitioner is a Delaware corporation (R. 41). It is engaged in the business of manufacturing motor vehicles with a plant and principal place of business at Dearborn, Michigan, and assembly plants *inter alia* at Chicago, Illinois, Cincinnati, Ohio, and Louisville, Kentucky (R. 42). The plant at Dearborn, Michigan, manufactures the parts, *i. e.* motors, chassis, wheels, fenders, bodies, etc., which are then shipped to the assembly plants (one assembly plant is also maintained at Dearborn), where manufacture of the motor vehicle is completed by the assembling, painting and processing of these parts (R. 61).

The assembly plants also operated as regional sales agencies with territories that in the instant case overlap state boundaries. No assembly plant is located in Indiana (R. 42, 43), but petitioner maintains at Indianapolis a branch for storage and distribution, this branch being allotted a territory in the central part of Indiana, the remainder of the State being divided among the out-of-state assembly plants (R. 49-50).

5. Method of Ordering. The dealers place a preliminary order with the branch to which they are assigned, by mail, by the tenth of each month. From these orders

petitioner makes up production schedules, allots the units and prepares shipping schedules (R. 50-51).

Dealer's order contains a detailed specification of the type of vehicle, color, body, upholstery, and special equipment and the units are manufactured specifically according to such orders at the assembly plant (R. 50-51).

6. **Delivery of the Units.** When manufacture has been completed at the assembly plant and the unit tested and checked against the invoice it is delivered to the dealer or a carrier at the gate of the assembly plant (R. 52). The Class A sales here involved were all delivered to the truckaway companies and none were delivered to the dealer (R. 63-64). The employees of the truckaway company signed the invoice as agent of the dealer without specific authority but as a matter of custom known to the dealer (R. 52-53).

7. **Payment by the Dealers.** In regard to Class A sales the dealer paid the purchase price to the truckaway company in cash upon delivery by the truckaway company at the dealer's place of business in Indiana; or by executing finance papers to a finance company, where by pre-arrangement the finance company agreed to pay the petitioner the cash represented by such finance papers; or by a combination of cash and finance papers. All such cash and finance papers were delivered to the truckaway company at the dealer's place of business in Indiana and were transmitted by it to the petitioner at its out-of-state assembly plants (R. 63-64). Petitioner erroneously states in its brief (p. 5) that some payments were made in cash or by finance papers before the product left the assembly plaat, and refer to R. 53 where the court is considering petitioner's general practice as to all sales. At R. 63-64 the court clearly states

that all sales *involved in this action* were paid for at the dealer's place of business in Indiana upon delivery.

The finance papers are in the form of trust receipts reciting that a security interest has passed to the finance company (R. 54). Both the truckaway and finance companies were independent of the petitioner and the dealers. The truckaway companies were contract carriers until 1937 and common carriers thereafter.

8. **Retention of Control During Shipment.** The petitioner exercised its right of title and possession during shipment by diverting deliveries "*a great many times*," during the entire course of assembly and shipment and up to the time of final payment by and delivery to the dealer at his place of business in Indiana (R. 57-58). In such instances, the petitioner would direct delivery to another dealer even during or at the termination of transit and would re-bill the unit to such other dealer.

9. **Ultimate Facts Stated by the Court.** Upon these facts the court stated the ultimate facts that these units were delivered by petitioner to its Indiana dealers in the State of Indiana (Finding 17, R. 78); that the truckaway companies acted as agents of the dealers where they signed finance papers on their behalf; as agents of the petitioner in transmitting collections from the dealers to petitioner; and as carriers in the transportation of the goods, and that the receipts from such sales were derived from sources in Indiana from the sale and transfer of the goods which were delivered to the purchaser in Indiana.

10. **The Facts Concerning the Account Stated.** While this cause was pending in the trial court pursuant to conversations between counsel, petitioner requested a rehear-

ing upon its petition for refund theretofore filed with the respondents (R. 68). Pursuant to such request counsel and one, Elmer F. Marchino, an employee of respondents, designated as a hearing judge to hear such matters, made a further investigation of the facts (R. 69), and pursuant to such request for a re-hearing and the investigation thereon the Hearing Judge executed and mailed to petitioner a letter which appears on pages 73-75 of the record and which may be summarized as follows: It is stated that the request for reconsideration was based upon the contention of the petitioner that the transaction concerning the sale of petitioner's motor vehicles,

> "At points outside of the State of Indiana and there delivered to Indiana customers within the territorial limits of that outside branch or assembly plant constituted a transaction completed in its entirety outside of the State of Indiana and thus did not fall within the purview of the Gross Income Tax Act."

The facts upon which the decision was made are stated to be that the Indiana dealers or their authorized agents take delivery at the out-of-state assembly plant under conditions whereby petitioner at the time of delivery is paid for the products either in cash or by appropriate financing and does not have the obligation or responsibility to make delivery into Indiana or to initiate the transportation into Indiana, but on the contrary that petitioner's entire responsibility ceases at the time of delivery of the products at the assembly plant outside the State.

It was then held that *such transactions* are completed at a business situs entirely outside of the State of Indiana and are not transactions in interstate commerce and that a refund will be made thereon.

Following this decision various conversations and negotiations were had between counsel, court and employees of the Department and, pursuant to the directions in the decision that the Department take the necessary steps to make refund, an audit was made by the respondent (R. 77) by which audit the Department found that the transactions mentioned in the decision amounted to $10,267.45, upon which petitioner was entitled to a refund of $25.67, which was paid and accepted without prejudice to the rights of the parties (R. 77, Finding 14).

Upon these facts the court made the ultimate finding that respondent did not at any time promise to refund $78,514.10 (being the tax on *all* Class A sales), or any other specifically stated amount, and that no certificate of over-assessment was ever issued by respondents (R. 77, Finding 15).

11. Conclusions of Law. Upon these facts the court concluded *inter alia* that no account stated arose between petitioner and respondents, that the tax assessed and collected under Class A transactions is not prohibited by the Constitution of the United States and was lawfully assessed and collected and that the law is with the respondents and against the petitioner (R. 81).

12. Decision of the Circuit Court of Appeals. This cause being submitted to the Circuit Court of Appeals solely upon errors arising out of the court's conclusions of law (R. 98), the court quoted the Findings of Fact referring particularly to Class A sales (being Finding No. 10, R. 63, and Finding 17 (B), R. 79-80), and held that from these Findings it is clear that all transactions in Class A sales took place in Indiana except the manufacture, assembling, and shipment of the goods and the

receipt of some orders, and distinguished *Department of Treasury v. International Harvester Company*, 47 N. E. (2d) 150, upon the ground that in the Class A sales in that case the articles were accepted and paid for outside of Indiana, while in the case at bar they were accepted and paid for in Indiana (R. 101). To this conclusion Bindley, D. J., dissented.

The court further held that no account stated arose between the parties. In this regard the opinion was unanimous.

SUMMARY OF ARGUMENT

I.

There Is No Error in the Decision That the Source of Petitioner's Receipts Was Within the State.

Section 2 of the Indiana Gross Income Tax Act of 1933 taxes non-residents upon all their gross receipts from sources within Indiana.

The geographical source of income from the manufacture and sale of goods is in the jurisdiction where the sale is made.

Eastman Kodak Co. v. D. C. (1942), 76 U. S. App. D. C. 339, 131 Fed. (2d) 347;

Tootal Broadhurst Lee Co. v. Commissioner (1929), 30 Fed. (2d) 239.

Upon the facts the gross receipts taxed were received from sales consummated by delivery in Indiana.

Webb v. Clark County (1927), 87 Ind. App. 103;

Bruno v. Phillips & Co. (1923), 80 Ind. App. 658, 667;

Franklin Bank v. Boeckeler Lbr. Co. (1924), 83 Ind. App. 94;

Martz v. Putnam (1888), 117 Ind. 392;

U. S. Express Co. v. Keefer (1877), 59 Ind. 263;

Branigan v. Hendrickson (1896), 17 Ind. App. 198.

II.

The decision below does not conflict with *Department of Treasury v. International Harvester Co.* (1943), 221 Ind. 416.

That decision holds that where a sale is consummated by delivery outside the State of Indiana the receipts from that sale are not received from a source within Indiana. It also holds that where goods are delivered in Indiana pursuant to a sale negotiated elsewhere the receipts from the sales are received from a source within the State.

This interpretation is further evidenced by the companion case of *Department of Treasury* v. *Loose-Wiles Biscuit Company* decided upon the same day.

The *International Harvester* case was decided under the original Gross Income Tax Act, whereas the Act has been broadened by amendment in 1937 and part of the receipts here involved were correctly taxed under the amended Act.

State v. Board (1925), 196 Ind. 472.

III.

There was no error in the decision denying petitioner recovery upon an account stated. The officials who were alleged to have stated the account had no authority to contract on behalf of the State.

Julian v. State (1890), 122 Ind. 68;
McAslin v. State (1885), 99 Ind. 428.

The court below expressly found that the only contract between the parties was that the respondent would make a new audit to determine the amount to be refunded, if any, in accordance with the legal principles stated by the Letter of Findings issued by the hearing judge. This agreement the court found to have been fully performed by the respondent. The petitioner has not assigned as error any insufficiency of the evidence to support such specific findings and the evidence is not in the record before this court. Wherefore, such findings must be assumed to be correct.

The court below further specifically found that the parties did not know the amount involved in the sales described in the Letter of Findings and that respondent did not promise to pay petitioner $75,514.10. The sufficiency of the evidence to support these findings is not questioned and, therefore, there cannot be any account stated.

Bouslog v. Garrett (1872), 39 Ind. 338.

IV.

The Facts Stated by the Court of Appeals Are in Accord With the Findings of Fact Stated by the Trial Court.

The petitioner relies upon various statements of evidentiary fact appearing in the findings of the trial court. The evidence upon which the trial court found the facts is not in the record. The petitioner does not present any question as to the sufficiency of the evidence to support all the facts found by the trial court but merely argues that each fact unfavorable to it constitutes a conclusion of law.

The facts as found by the trial court are consistent and fully support the statement of the case made by the Court of Appeals.

ARGUMENT

Petitioner's specifications of the questions involved and of assigned errors presents no question concerning the constitution or laws of the United States. (*Petition for Writ of Certiorari*, pp. 2 and 13; *Petitioner's Brief*, p. 11.) Only questions of state law are presented and argument will be limited to these questions. (Rule 38, par. 2.) The specifications will be discussed in the order in which they are stated.

I.

The Trial Court and Court of Appeals Correctly Held That the Source of Petitioner's Receipts Was Within the State of Indiana.

1. The Taxing Act to Be Construed.

The tax which petitioner seeks to have refunded was assessed and collected upon its gross income for the years 1935 to 1939. This tax was levied in part by section 2 of the Indiana Gross Income Tax Act of 1933 and in part by an amendment of that section in 1937. The pertinent parts of the original and amended acts with additions in italics and eliminations in struck type are as follows:

> "Such tax shall be levied * * * upon the receipt of gross income derived from ~~sources~~ *activities or business or any other source* within the State of Indiana, of all persons ~~and/or companies, including banks,~~ who are not residents of the State of Indiana, ~~but are engaged in business in this State or who derive gross income from sources within this State~~ * * *."

Cf. Appendix A, p. 41, *post*.

2. "Source" of Income Defined.

Were the petitioner's gross receipts derived from "sources" within Indiana under the 1933 act and from "activities or business or any other source" under the 1937 amendment?

> "It has been consistently held that, unless a different legislative intent appears, the geographical 'source' of income from the manufacture and sale, or purchase and sale, of goods is in the jurisdiction where the sale is made."
>
> *Eastman Kodak Co. v. D. C.* (1942), 76 U. S. App. D. C. 339, 131 Fed. (2d) 347.

In *Tootal Broadhurst Lee Co. v. Commissioner* (1929, C. C. A., 2), 30 Fed. (2d) 239, 240, the court says:

> "The method of disposing of petitioner's product was by sale in the United States. It was the happening of that event, the sale, which was the determining factor of whether it sustained a loss or made a profit. The gross income thus came from sources within the United States."

This statement is equally applicable to a gross receipts tax where the sale is the determining factor as to any amount to be received. Such a tax upon gross income from sources within the State so applied as to be levied upon the sale price of goods sold within the State does not contravene the due process clause. *Panitz v. D. C.* (1941), 74 U. S. App. D. C. 283, 122 Fed. (2d) 61. Nor would it constitute an unlawful burden upon interstate commerce. *International Harvester Co. v. Department* (1944), 321 U. S. —.

3. The Factual Issue.

The present issue is one of fact as to whether the sales were consummated in Indiana. If so, they are taxable. If not, they are not subject to tax. Both the District Court and the Circuit Court of Appeals resolved this factual issue in favor of respondents.

The trial court found as an ultimate fact that the property sold was delivered in Indiana (Finding No. 17(a), p. 78) and that the gross receipts in question were derived from sources in Indiana, from the sale and transfer of plaintiff's property (Finding No. 176, p. 80). Petitioner contends, however, that these findings are conclusions of law which must be disregarded and that they are inconsistent with other findings. The material facts are as follows:

The relationship between petitioner and its dealers was founded upon an express written contract which provided that neither delivery of possession nor transfer of title should pass to the dealer prior to full payment of the purchase price. "Payment by Dealer is to be in cash before delivery" (clause 2, R. 44) and "Title * * * until actually paid for by dealer shall be and remain in Company;" (R. 45, cl. 6). Under the law of Indiana which controls in this case under the doctrine of *Erie R. Co. v. Tompkins* (1938), 304 U. S. 64, these provisions postpone the transfer of title and possession until the purchase price is paid. Until then there is an executory contract of sale but no sale. *Webb v. Clark County* (1927), 87 Ind. App. 103; *Bruno v. Phillips & Co.* (1923), 80 Ind. App. 658, 667; *Franklin Bank v. Boeckeler Lbr. Co.* (1924), 83 Ind. App. 94, 97. Petitioner argues, however, that these provisions merely reserve in petitioner a security interest. But the

distinctive elements of a conditional sale are "Possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price." *11 Burns' Indiana Statutes (1943 replacement) 58-801, (Uniform Conditional Sales Act) Appendix C, post*, p. 47. The present contract postpones both delivery of possession and transfer of the title to the time of payment of the purchase price, at which time possession and title are transferred to the buyer without reservation of any security interest. Prior to such payment the buyer has neither title, possession, nor any other claim in the goods. No credit is extended which a security interest could secure.

Petitioner's retention of full property in the goods during transit and up to the moment of payment is further evidenced by its exercise of control over the goods during that time by diverting them to other purchasers. (R. 57, par. n.) While such diversions were small in proportion to total sales, the volume was large enough that such diversions occurred "*a great many times.*" (R. 57, par. n, 4.) The practice of making these frequent diversions is adverted to for no other purpose than that of showing that the rights of possession and ownership granted by the contract were exercised by petitioner at all times before payment was received and delivery made at the dealer's place of business.

Petitioner points to the provisions of the contract making the sale "f. o. b. Detroit" (R. 44, clause 2) and requiring the dealer to pay "*such amount as Company shall * * * determine*" for freight and handling expense (R. 44, clause 3) as indicating that the place of delivery is elsewhere than at the dealer's place of business. The only

place of delivery that such provisions could refer to is Detroit, Michigan. But this is impossible. The manufacture of the automobiles was not completed until they issued from the assembly plants at Chicago, Cincinnati, or Louisville, where they were assembled, painted and processed. (R. 61.) The only interpretation consistent with the facts is that these provisions established Detroit as a price basing point. Petitioner retained the right as a seller to include in the purchase price such amounts as it chose to charge as freight and handling expense which might or might not approximate the actual freight rate for shipment of a completed automobile from Detroit to the dealer's place of business. In fact, if the actual freight was paid by the dealer it alone was credited to the charges thus set by petitioner and petitioner made any profit represented by the difference. It would seem to be obvious then that these provisions established pricing arrangements rather than specifying any point of delivery. In fact, petitioner's full retention of control over the means, manner and routing of shipment would be more indicative of its retention of possession during such shipment than otherwise.

Petitioner also contends that the provision of the contract placing all shipments at dealer's risk from point of shipment indicates an intent to make delivery at that point. It can well be argued, however, that this provision implies a contrary intent. If the sale were consummated at the place of shipment, then the risk of loss during shipment would be upon the buyer, as owner of the goods, without any contractual provision (*Branigan v. Hendrickson* (1896), 17 Ind. App. 198) and this stipulation would be surplusage. The necessity for the dealer's contractual assumption of risk arises out of the fact that the property

in the goods had not been transferred to him so as to impose that risk in the absence of express contractual assumption. At least this is the reasoning of the Supreme Court of Indiana in *Martz v. Putnam* (1888), 117 Ind. 392, 402, which, under the doctrine of *Erie R. Co. v. Tompkins* (1938), 304 U. S. 64, is the law of this case.

It is clearly apparent, then, that the contract between the parties expressly provides that the sale is to be consummated at the time of payment for the goods. But petitioner then argues that, in spite of the fact that the contract prohibits modification without the written approval of petitioner's executive officers (*R. 48, clause n.*), the contract was modified by the actual practice of the parties. First, it claims that because the petitioner, after shipment, looked to the carrier for its money, payment was received outside Indiana. But in doing so petitioner merely relied upon the carrier's legal liability. *U. S. Express Co. v. Keefer* (1877), 59 Ind. 263, 267. Petitioner does not disclose any reason why the petitioner's reliance upon the carrier's agreement to act for petitioner in collecting the price before delivery changed the place of payment, delivery, or transfer of title.

Second, petitioner relies upon the act of the carrier in receipting the invoice on behalf of the dealer at the time of shipment of the goods and the court's statement that in doing so the carrier acted as agent for the dealer. This argument first collides with the principle that delivery of the invoice does not consummate the sale. *Franklin Bank v. Boeckeler Lbr. Co.* (1924), 83 Ind. App. 94, 97. If it be conceded, however, that the signature to the invoice acknowledged receipt of the goods by the carrier on behalf of the dealer, yet, we must inquire in what capacity the

goods were so received. All other acts and agreements of the parties are inconsistent with the view that the goods were received by the dealer as owner. Under the facts his only interest was in protecting himself upon his assumption of risk during shipment. If the custody of the carrier was the custody of the dealer, it was as bailee for this purpose only. *Martz v. Putnam* (1888), 117 Ind. 392, 403. The goods were still the property of the petitioner which it could and a great many times did divert to other purchasers during shipment. The mere holding by the seller or buyer as bailee under an assumption of the risk of loss does not consummate the sale. *Martz v. Putnam* (1888), 117 Ind. 392, 402-3.

The sales in question were those where the purchase price was paid at the dealer's place of business in Indiana. (R. 63-64.) The court's finding as to the different methods and times of payment (R. 53) had reference to petitioner's sales in general and included sales not here involved, where payment was made differently. The goods having been paid for at the dealer's place of business in Indiana, simultaneous with unconditional delivery of the goods themselves, the sale was then and there consummated under the terms of the contract of sale and the source of the gross income was at that point in Indiana.

II.

The Trial Court and Court of Appeal Correctly Held That the Trial Court Decision Did Not Conflict With Department of Treasury v. International Harvester Co. (1943), 221 Ind. 416.

The decision in *Department of Treasury v. International Harvester Co.* (1943), 221 Ind. 416, is not only

consistent with this argument, but it supports it. That case concerned four types of sales. *Class A sales* were those where, upon orders taken by salesmen traveling in Indiana and accepted at a branch in Illinois, the Illinois branch shipped to the customer in Indiana under a sales contract requiring the purchaser to "accept delivery of said goods at points of shipment." *Appendix D, p. 48, par. 1.* Although the seller reserved title with the right of re-possession upon default. *Class C & D sales* were made under the same form of contract, but delivery was made at the factory in Indiana. In the former the selling branch was located out of state and the customer was within the state while in the latter the selling branch was within the state and the customer was out of state. *Class E sales* were made by an Indiana branch to an Indiana customer where the goods were shipped from an out of state warehouse pursuant to contracts so providing.

The Indiana Supreme Court held the Class A sales to be from a source without the state and non-taxable under Section 2 of the Indiana Gross Income Tax Act. Petitioner claims that the decisions below are inconsistent with that case. Respondents attach to this brief as Appendix D, p. 48, a copy of the contract in that case as it appears in the record in cause 355, October Term, 1943, *International Harvester Co. v. Department of Treasury*, 321 U. S. ..... A comparison of that contract with the contract in this cause discloses their essential dissimilarity. Whereas the contract here expressly provides that delivery shall not be made until full payment of the purchase price which was paid in Indiana at the destination, the contract in that case expressly required the buyer to take possession at the point of shipment which was out of the state, subject to a right of re-possession in the event of a default in payment

of the price. *Appendix D, p. 48, post, paragraphs 1 & 2.* The sales in that stated case were not consummated in Indiana. The decision below and the decision in the *International Harvester* case consistently apply the test set forth in Paragraph I, *supra*, that, the geographical 'source' of income from the manufacture and sale of goods is in the jurisdiction where the sale is made.

The companion case of *Department of Treasury v. Loose-Wiles Biscuit Co.* (1943), 221 Ind. 248, decided by the Court upon the same day as the *International Harvester Co.* case is enlightening as to the meaning of the court. That case was not contested by the taxpayer, and the facts do not appear in the opinion. However, pertinent quotations from the complaint and stipulation of facts in that case are attached to this brief as *Appendix E, p. 55,* to show that taxpayer claimed that the receipts there taxed were not taxable under the Gross Income Tax Act and to show that the facts in that case were similar to those in the *International Harvester* case with the exception that the sales were consummated by delivery in Indiana. This confirms respondents' contention that delivery in Indiana was the taxable event under the 1933 act so far as income from sales is concerned.

The essential facts have been heretofore reviewed at length. The Special Master, the Trial Court and the Court of Appeal have all concurred in these facts and in holding the source to be within the state. To the great weight which their concurrence lends must be added the decision of the respondents which is the highest legally authorized authority of the state which has interpreted the effect of the particular facts in this case.

The 1937 Amendment to the gross income tax law governs the tax liability of petitioner for the periods after

April 1, 1937, which was the effective date of such amendment. This amendment substituted "*gross income derived from activities or business or any other source within the State of Indiana*" as the subject of taxation in place of "*gross income from sources within the State of Indiana*" which was the subject of tax in the original act. That this is an enlargement of the income subject to tax is evident from the statement of the Court in *Department of Treasury v. International Harvester Co.* (1943), 221 Ind. 416, 422, that "Perhaps we should call attention to the fact that No. 2 of the Gross Income Tax Act of 1933 has since been amended." This is at least a hint from the Court that their decision might have been different if the amended act had been under consideration. Petitioner claims that this amendment did not enlarge the scope of the act and that the meaning and intent of the amended section is identical with the original. However, the Indiana rule is that the legislative introduction of new words into a statute indicates a change in legislative meaning, that all words used in a statute must be given a meaning where possible and that in those cases the rule of *ejusdem generis* will be disregarded. *State v. Board* (1925), 196 Ind. 472. If the added words "*Business*" and "*Activities*" are to be given a meaning in addition to the retained word "*sources*," it is evident that the scope of the act has been broadened and the legislature intended to tax transactions not previously taxed.

The act, as so enlarged, would tax income received by reason of business done or activities engaged in within the state even though the transactions from which such activities were received were not fully consummated within the state. The business and activities of petitioner would clearly fall within this enlarged scope.

III.

The Trial Court and Court of Appeals Correctly Held That No Account Was Stated Between the Parties Regarding the Tax on Class A Sales.

The powers of all state officers in Indiana are limited to those powers expressly or impliedly conferred by law and all persons dealing with such officers must take notice of the source of such officers' authority. *Julian v. State* (1890), 122 Ind. 68, 73; *McAslin v. State* (1885), 99 Ind. 428, 439-40.

Any account stated must rest in contract and no contract with the state may arise unless the officer who made it had statutory authority for that purpose. Petitioners cite no such statutory authority and a careful reading of the Indiana Gross Income Tax Act discloses none.

Although Mr. Marchino is denominated a "Hearing Judge" (R. 41), there is no provision in the Gross Income Tax Law or any other law which mentions such an office or grants any power to it. On the contrary, the entire administration of the Gross Income Tax Law is lodged in the "Department" and it is specifically required that all documents must be signed by the "Director" in order to constitute the official act of the Department (11 Burns' Ind. Stat. (1943 Replacement), Sec. 64-2628, Appendix A, p. 41, *post*). The decision by Mr. Marchino was not signed by the Director (R. 71, g). It did not, therefore, constitute an official act of the Department but was merely advisory to the Director.

It must be apparent, therefore, that the said officers charged with having contracted the account stated had no authority to make such a contract. Any attempt to do so

is void and of no effect. Any finding as to the extent of their powers and authority is a pure conclusion of law which must be disregarded if it conflicts with the statutes and decided cases.

An account stated (being an agreement between the parties to a current or running account—an assent to an account—that a certain amount is due one of the parties to the account) is not in this case demonstrable. At no time was such an agreement made.

At no time was there an assent to an account.

At no time was a certain amount represented as being due.

If it were to be conceded that the taxing officials had the power and jurisdiction to contract an account stated, yet, it should seem aparent that none was finally agreed upon. The basis of petitioner's alleged account stated is the letter of findings by Mr. Marchino dated March 1, 1941. This letter of findings related to drive-away sales entirely completed at an out-of-state location. It was a statement of legal principles to be later applied to the facts as they were developed by the audit section of the department.

It is most significant that no amount is mentioned. Tax departments are not in the habit of issuing final decisions granting refunds without stating the amount to be refunded. This statement of principles is obviously an interlocutory, preliminary decision upon which further action is necessary before payment can be made. In this respect it differs materially from the decisions of the collectors relied upon by the taxpayers in the cases cited by petitioners, which decisions were final and complete. There the only action remaining to be done was the ministerial act

of making payment. Here further investigation, action and determinations were necessary. These required the exercise of discretion by the respondents.

The court specifically found that respondents did not know the amount of petitioner's gross income to which the letter of findings would apply *(Finding 13 p., R. 77)*. Absent any objection as to the sufficiency of the evidence to support this finding, it must be accepted as correct. The evidence is not in the record and although petitioners rely upon certain evidentiary facts found by the court, it cannot be presumed that these findings state all of the evidence, but it must be assumed that the evidence supported the finding. Other findings, likewise uncontested, were that petitioners and respondents understood that this letter of findings ordered a refund following an audit to determine the amount. *(Findings 13 p., R. 77.)* This is a clear finding of fact as to the actual understanding and agreement between the parties. The agreement, if any, was that the respondents would make a new audit to determine the amount to be refunded in accordance with the legal principles stated by the Hearing Judge. This agreement the respondents performed. *(Finding 14, R. 77.)* The only contract between the parties, if any, has been fully executed and there is no breach that could be the basis of a cause of action.

The existence of any promise by respondents to pay petitioners $78,514.10 is specifically negatived. *(Finding 15, R. 77.)* Such a promise cannot be implied when it is specifically found that the respondents did not know the amount involved, but intended to determine the amount by future audit. *(Finding 13 p., R. 77.)* These are findings of fact, not mere evidence, not conclusions of law.

They have not been questioned by assigning insufficiency of the evidence as error and the evidence supporting them is not before the court.

This case is, then, governed by *Bouslog v. Garrett* (1872), 39 Ind. 338, where the court said:

> "The evidence shows the parties attempted to make settlement of their accounts, but disagreed before they got through, and made and agreed upon no balance. In our opinion, the evidence did not sustain the paragraph on the account stated. We also think that instructions three and four were erroneous, for the reason that they informed the jury that a partial statement of the accounts by the parties, without their having arrived at any balance, was binding upon them as an account stated."

The sales in question, in Mr. Marchino's opinion, were those where the Indiana dealer paid for the car at the out-of-state branch and there took delivery. Under such circumstances the title and dominion there passed to the customer and the petitioner had no property in it when it came to Indiana. Such a finding regarding such sales does not in any manner constitute an agreement regarding the sales here in question, where payment was made on delivery in Indiana of goods then owned and under the dominion of petitioner (R. 64).

The letter of findings referred the file to the Refund Section (R. 75) and, upon audit being made, it was found that sales of the character mentioned in the letter of findings amounted to $10,267.45, and the tax paid upon this amount has been refunded to petitioner (R. 77, Finding Fourteen).

The most that can be said for petitioners' contention is that Mr. Marchino stated the law and referred the matter to an audit for further development of the facts and figures. Upon development of the facts by the audit, the Department paid according to the letter of findings and refused to pay upon those transactions which did not coincide with those described in the letter of findings.

In conclusion, there is no merit to petitioners' insistence that there was an account stated in this cause of action.

IV.

The Court of Appeals Did Not Err in Stating the Facts.

Respondent has heretofore reviewed the facts in detail to show that the facts found by the trial court are consistent with the decision of the Court of Appeals. The petitioners cite many evidentiary facts contained in the finding as to what the parties did, and from these evidentiary facts infers ultimate facts contrary to the ultimate facts found by the trial court upon *all* of the evidence.

Any findings of facts adverse to petitioners is labeled by it as a conclusion of law. However, findings as to the place of delivery, the intent of the parties, the existence, non-existence or terms of the contract alleged as an account stated, and the party for whom the carrier acted in a certain transaction are all findings of fact. The sufficiency of the evidence to support them has not been questioned. The evidence is not in the record and it must be assumed that these findings are supported by the evidence.

In attempting to overthrow these facts petitioners would differ with the trial court as to the weight to be accorded

to different items. It would ignore the provisions of the express contract between the parties entirely and substitute therefor its own partisan inferences drawn from acts whose purpose is obscure.

Petitioners' attack on the Court of Appeals is unwarranted and unjust.

CONCLUSION

It having been shown herein that *all* the evidence when read together substantiates the judgment below and shows that the receipts taxed were derived from sales consummated in Indiana, the contention that they were derived from sources without the state must fail whether such facts be measured by the decision in *Department of Treasury* v. *International Harvester Co.* (1943), 221 Ind. 416, or otherwise.

Likewise, the action or account stated must fail for lack of an agreement by an authorized official agreeing upon a balance due.

Petitioner makes certain arguments as to constitutional questions not brought to this court in the specification of errors. Some of these have been very briefly met. *McLeod v. J. E. Dilworth Co.* (1943), 64 S. Ct. 1023 is distinguishable upon the fact that the sale was consummated without the state. The due process argument alleging a discrimination between the taxability of residents and non-residents ignores the specific provision of section 1 (m) of the Gross Income Tax Act (*Petitioner's Brief, Appendix* A., p. 29) whereby residents are exempted only upon receipts derived from sources outside Indiana and attributable to a business having a legal situs outside the state.

If this court is without jurisdiction by reason of the matters noted in the Statement as to Jurisdiction, *supra*, appropriate disposition should be made by dismissal. Otherwise, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Indiana Gross Income Tax Act of 1933

Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided.

Indiana Gross Income Tax Act of 1933 as Amended in 1937

Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other

taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided.

Sec. 14. (a) If any person considers that he has paid to the department for any year an amount which is in excess of the amount legally due from him for that year under the terms of this act, he may apply to the department, by verified petition in writing, at any time within three years after the payment for the annual period for which such alleged overpayment has been made, for a correction of the amount so paid by him to the department and for a refund of the amount which he claims has been illegally collected and paid. In such petition, he shall set forth the amount which he claims should be refunded, and the reasons for such claim. The department shall promptly consider such petition, and may grant such refund, in whole or in part, or may wholly deny the same. If denied in whole or in part, the petitioner shall be forthwith notified of such action of the department, and of its grounds for such denial. The department may, in its discretion, grant the petitioner a further hearing with respect to such petition. Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected; Provided, however, That no court shall entertain such a suit, unless the taxpayer shall show that he has

filed a petition for refund with the department, as hereinabove provided, within one year prior to the institution of the action: Provided, further, That no such suit shall be entertained until the expiration of six months from the time of the filing of such petition for refund with the department, unless in the meantime, the department shall have notified the petitioner, in writing, of the denial of such petition. Any such petition shall be subject to the provisions of section 11 (b). In every such action, a copy of the complaint shall be served upon the department, with the summons, which summons shall be so served at least fifteen (15) days before the return date thereof. It shall not be necessary for any taxpayer to protest against the payment of the tax in order to maintain such suit. In any suit to recover taxes paid, or to collect taxes, imposed under the provisions of this act, the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

(b) Either party to such suit shall have the right to appeal, as now provided by law in civil cases. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the treasurer in favor of such taxpayer, to pay such judgment, interest and costs. It shall be the duty of the treasurer to honor such warrant and pay such judgment out of any funds in the state treasury not otherwise appropriated.

Sec. 21. On or before the fifth day of each month the total amount received from taxes levied under the provisions of this act during the preceding month shall be paid by the department into the state treasury and credited to the general fund.

Sec. 28. The administration of this act is vested in and shall be exercised by the department of treasury, except as otherwise herein provided. Such administration shall be under the supervision of the director, and all notices, summons, warrants, waivers, demands, and other written documents except as otherwise provided in section 29, shall be signed by him, and when so signed shall be regarded as the official acts of the department. The enforcement of any of the provisions of this act in any court shall be under the direction of the Department. The director may require the assistance of, and act through, the prosecuting attorney of any county, and may, with the assent of the governor, employ special counsel in any county to aid the prosecuting attorney, the compensation of whom shall be fixed by and paid only upon the approval of the governor; but the prosecuting attorney of any county shall receive no fees or compensation for services rendered in enforcing this act, in addition to the salary paid to such officer. The director, with the approval of the governor, may appoint, as needed, such counsel, agents, clerks, stenographers, and other employees as authorized by law, who shall serve under him, shall perform such duties as may be required, not inconsistent with this act, and are hereby authorized to act for the department as the director may prescribe and as provided herein. In case of violation of the provisions of this act, the department may decline to prosecute for the first offense, if, in the judgment of the director, such violation is not willful or flagrant.

APPENDIX B

Constitution of Indiana (1852)

Art. 4, Sec. 24. Suits Against the State. Provision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed.

2 Burns' Indiana Statutes (1933)

4-1501 (1550). Claims Against State—Where Suit May Be Brought. Any person or persons having or claiming to have a money demand against the state of Indiana, arising, at law or in equity, out of contract, express or implied, accruing within fifteen (15) years from the time of the commencement of the action, may bring suit against the state therefor in the superior court of Marion County, Indiana, by filing a complaint with the clerk of the said court and procuring a summons to be issued by said clerk, which summons shall be served upon the attorney-general of Indiana thirty (30) days before the return day of the summons; and jurisdiction is hereby conferred upon said superior court of Marion County, Indiana, to hear and determine such action, and said court shall be governed by the laws, rules and regulations which govern said superior court in civil actions in the making up of issues, trial and determination of said causes, except that the same shall be tried by all the judges of said court sitting together without a jury: Provided, That suit may be brought upon any claim falling within the class described in this section, without reference to the time when such claim

accrued, in case such claim be based upon any written warrant, voucher or certificate properly issued and signed, under authority of law, by any board of directors or control in charge of the construction of the northern Indiana state prison. (Acts 1889, ch. 128, § 1, p. 265; 1895, ch. 112, § 1, p. 231).

APPENDIX C

11 Burns' Indiana Statute (1943 Replacement), 58-801 Uniform Conditional Sales Act

Definitions. In this act "conditional sale" means (1) any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (2) any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract.

APPENDIX D

Sales Contract Involved in Department of Treasury v. International Harvester Company (1943), 221 Ind. 416

"SALE CONTRACT AND PRICE SCHEDULE

Dated ....., 19.....

TO

International Harvester Company of America

.....

.....

The undersigned, the Purchaser, hereby orders of said Company the goods marked as ordered in the list made a part of this contract, and requests that the same be shipped

to .....

at .....

on or about the date or dates indicated herein.

In consideration of the acceptance of this order, the Purchaser agrees to all the terms, conditions and provisions of this contract, as follows:

1. To accept delivery of said goods at points of shipment, receive the same on arrival, pay all freight charges thereon from the f. o. b. point or points named in the price schedules, and settle for the same at the dates, terms and prices designated in the price schedules attached hereto. The Purchaser shall pay for said goods in cash on or before the dates specified, and if not then paid, shall pay interest on such purchase price at the rate of ..... per cent

per annum and shall at any time upon the company's request execute and deliver a bankable note or notes for the purchase price of said goods or any of them, said notes to mature at the dates herein agreed upon for payment and to draw interest thereafter at the above named rate.

2. The title to all goods shipped under this contract, with right of repossession for default, is reserved by the Company until the Purchaser has made full payment in cash for all of said goods and for all notes given therefor. Prior to full settlement in cash the Purchaser shall have no right to sell or dispose of any goods delivered hereunder except for value received in the ordinary course of trade and upon the express condition that prior to the delivery of any of said goods to a customer, the Purchaser shall secure from said customer a full settlement in cash or goods and bankable notes and that the proceeds of all resales shall be considered the property of the company in lieu of the goods so sold and held in trust for it and subject to its order, as provided in paragraph four hereof, until all sums due under this contract have been fully paid. At any time on request the Purchaser will give the company's representatives full information regarding goods on hand, goods sold and the proceeds thereof, to enable it to ascertain and enforce its reserved rights under this clause. Nothing herein shall release the Purchaser from payment for all goods ordered and delivered hereunder and after delivery to him said goods shall be held at his risk and expense in respect to loss or damage from any cause and taxes and charges of every kind.

3. Warranty. (On all goods covered by this contract except Farm Trucks and Wagons. Wagon warranty is given on page 158.) The Company will furnish the Pur-

chaser with a supply of printed forms for use in reselling the goods ordered hereunder and containing written warranties applicable to the several kinds of goods. In all cases where the Purchaser gives his customer a written warranty in the form suggested, the company will protect the Purchaser and stand back of him in giving such warranty. This agreement, however, is conditioned on the Purchaser giving the Company's Branch Manager prompt written notice of any claim or complaint by a customer. The Company shall be under no liability whatever except where a written warranty is given in said approved form without addition or alteration of any kind, and shall be released from all liability hereunder in case the Purchaser shall, without its consent, waive compliance by his customer with any of the conditions of said warranty. The Company reserves the right to change the form of warranty in any of said order blanks at any time. The net price (but no freight or express charge) of any parts which the Purchaser is liable to furnish and shall furnish a customer in fulfillment of any such warranty may be charged back to the Company, but in all such cases the broken or defective parts must be exhibited at settlement time to the authorized agent of the Company and returned to the Company, if requested. This agreement is given and accepted in lieu of all other warranties, expressed or implied.

4. Upon request of the Company at any time the Purchaser agrees to turn over, endorse and assign to the Company a quantity of customers' notes, or, if notes are not available, then customers' accounts sufficient to fully cover and secure all indebtedness of the Purchaser hereunder, such notes and accounts to be held as collateral security to said indebtedness. Payment of said customers' notes and accounts at maturity is guaranteed by the Purchaser

and presentation, demand, protest, notice of protest and diligence are waived both as to makers and endorsers. In case of default in payment of any said collateral notes or accounts, the Purchaser agrees to remit cash for full amount of same together with interest and collection charges within 15 days after maturity. All collections on collateral notes or accounts are to be credited on the note or notes or account of the Purchaser first becoming due. On payment of Purchaser's indebtedness in full, all collateral notes or accounts remaining in possession of the Company are to be returned.

5. The Purchaser further agrees that all repairs and extras for the goods specified, ordered and furnished hereunder shall be received and paid for at the prices quoted in the Company's latest repair price lists to dealers on the following terms:

> Net cash two months from 1st day of the month succeeding month of shipment, with interest after maturity, subject to discount of 5 per cent for cash if paid on or before the 1st day of the month succeeding month of shipment. Purchaser to pay all transportation charges on same from point of shipment except that if repairs are shipped from Branch Houses or Transfer points in or west of the States of Montana, Wyoming, Colorado or New Mexico, an additional charge of 10% will be made. The Purchaser agrees to order a sufficient quantity of repairs for all lines of goods handled hereunder to take care of the trade in the aforesaid territory during the term of this contract.

6. The Purchaser agrees to examine all goods on arrival and notify the Company of all claims on account

of shortage, defective or damaged goods or parts, within ten days after receipt of goods, and failing so to do the Company is not to be held responsible therefor. The Company shall have a reasonable time in which to make good any shortage or defective or damaged goods or to furnish parts to replace defective parts for which it is responsible.

7. All shipments are to be routed as the Company may direct, and the Company will use its best efforts to make shipments on or before the dates specified, but it shall not be responsible for failure to ship goods on time or to fill orders, where it is prevented by act of God, or by fire or other elements, or by riots, strikes, labor disturbances, or by the law or the decree or judgment of any court, or if the demand for any goods shall exceed the Company's available supply, or by any cause beyond the Company's reasonable control; nor shall the Company be liable for any delay, damage or loss occurring after delivery of goods to carrier, and all claims for damage in transit shall be made direct by the Purchaser against carrier.

8. In addition to the goods now ordered, all goods heretofore or hereafter shipped to the Purchaser, between the date of November 1, 1933, and October 31, 1936, both inclusive, shall be considered as sold under this contract, and subject to all of its provisions, except as different prices or terms have been or may be agreed upon at the time, and it is understood that the Company reserves the right to reject any orders for additional goods, or to change the prices and terms applicable thereto.

9. Cancellation or reduction in the amount of the original or any subsequent orders placed and accepted hereunder without the consent of the Company, or refusal to accept shipment of any goods in time for the 1936 selling season, shall be ground for termination of this contract

by the Company and refusal to furnish any further goods hereunder, the Purchaser, however, remaining liable to settle for all goods previously shipped in accordance with the terms hereof.

10. The Dealer agrees to reimburse the Company for any and all sales or excise taxes, whether imposed by Federal, State or local laws, which it may be required to pay or to reimburse to others by reason of the manufacture, purchase or sale of any goods delivered under this contract. The amount of said tax may be billed as a separate item or included in the invoice price of the goods at the Company's option.

11. The prices quoted herein are not guaranteed to be effective after June 1, 1936, and goods shipped after that date shall be paid for at the Company's price to dealers then in effect in Purchaser's territory.

12. In all cases where the attached schedules permit goods unsold at maturity date to be carried on extended terms to a subsequent year, it is understood that this is conditional on the prices on such carried-over goods being readjusted to conform with the Company's prices for similar goods in effect at the maturity date applicable to said goods.

13. It is understood that this order is taken subject to the acceptance of the Company's Branch Manager having charge of the district in which the Purchaser's principal place of business is located and that this contract contains the entire agreement between the parties with reference thereto, and that there shall not be any change in any of the prices, terms or conditions printed herein, unless such change is made and accepted in writing, by said Branch Manager. The copy of this contract retained by the Company shall be considered the original and shall control in

case of any variation between it and the duplicate retained by the Purchaser. The company's rights under this contract may be assigned to any affiliated Company. The Purchaser's rights under this contract shall not be assigned without the consent of the Company's Branch Manager. All indebtedness created under this contract shall be payable at the Company's Branch House named below.

Purchaser's
Signature .....

.....

Witnesses: .....

.....

(Traveler)

Accepted at .....
(Fill in Town and State) (Branch House)

....., 19.....

INTERNATIONAL HARVESTER COMPANY
of America
(Incorporated)

By .....

(Branch Manager)

PRICE GUARANTEE

If the International Harvester Company of America should reduce its prices to dealers on any of the various classes of goods covered by this contract, on or before the cash discount dates for said class of goods, as stated in the terms schedule herein contained, it agrees to adjust to such lower basis the prices of any complete machines of the class affected which were purchased under this contract and which remain unshipped or on hand unsold in the possession of the dealer at the time such price change becomes effective.

APPENDIX E

Taxpayer's Complaint in Department of Treasury v. Loose-Wiles Biscuit Company (1943), 221 Ind. 248, Alleged as One Ground for Refund of Gross Income Tax

"The plaintiff's receipts or proceeds from such transactions were not received in the State of Indiana and do not constitute receipts subject to the provisions and terms of the aforesaid Gross Income Tax Act."

The facts in that case were stipulated as follows:

"From plaintiff's distribution center at Indianapolis, Indiana, goods were furnished to customers in Warren, Tippecanoe, Carroll, Cass, Howard, Clinton, Tipton, Madison, Hamilton, Boone, Montgomery, Fountain, Parke, Owen, Morgan, Johnson, Shelby, Bartholomew, Brown, Monroe and parts of Sullivan and Greene Counties in Indiana not served by Evansville.

The respective territories in Indiana allocated by plaintiff to plaintiff's several bakeries and distribution centers, as hereinabove described, are shown on the maps attached hereto, marked "Exhibit A-1, A-2, A-3" and made a part hereof.

Plaintiff sells its products at wholesale to retail dealers who resell the same to the ultimate consumers. Plaintiff's products are semi-perishable in the sense that they deteriorate and become unsatisfactory for sale. The plaintiff recommends sales of their products by retailers within thirty to sixty days after manufacture, but in some instances some retailers have stock and make sales as much as one hundred and twenty days after manufacture. It

is advantageous to the plaintiff and necessary for its customers to make delivery of goods as quickly as possible. It is the practice of the plaintiff not to maintain stocks in its distribution centers or at its bakeries for longer than one week after the same are baked. The retail dealers do not carry large stocks of plaintiff's goods, and therefore require frequent service and rapid delivery on their orders to the plaintiff. On account of this condition, and the necessity for economy in transportation and delivery of the goods, and the necessity of meeting conditions arising out of competition with manufacturers of similar products whose bakeries or distribution centers are located conveniently to plaintiff's markets, the several territories in Indiana have been established and allocated by plaintiff to its respective bakeries and distribution centers as above described for the purpose of enabling plaintiff to provide prompt delivery of its products and meet its competition in the manner most satisfactory and most conducive to successful operation of its business.

The course of business practiced by plaintiff during the taxable period in respect to furnishing goods to its customers in the State of Indiana from its bakeries and distribution centers located outside of said State, and the collection of payment for such products, has uniformly been as follows:

In conjunction with its bakeries at Chicago and Dayton, and at its distribution centers in Cincinnati and Louisville, plaintiff at each of said places employs a manager who is termed a "sales agent" and who has certain authority over other employees in respect of sales, deliveries, collections and the accounting in relation thereto; also, salesmen who work out of such bakery or distribution center and solicit

orders in Indiana from the retailers located in the Indiana counties assigned by plaintiff to such bakery or distribution center; also, shipping clerks who assemble the orders, office employees who take care of the billing of the orders and handle the office details, and drivers who operate the trucks for delivery of such of the orders as are delivered by plaintiff's own equipment.

Orders for plaintiff's products are taken thus:

The salesman calls on the retailer in Indiana, solicits the order, and writes the order in the presence of the customer on a triplicate (carbon copy) order form, on which is written the name and address of the customer, the quantity, kind of package, name of article, weight, and price of products ordered. A typical copy of this form, filled in to indicate the nature of the entries, is attached hereto, marked "Exhibit B" and made a part hereof.

The salesman forwards all three copies of this order to the bakery or distribution center from which he is working. The total prices of the products ordered are there computed and extended in the last column of the order form. The original copy of the order form is then used as an invoice, and is delivered or sent to the customer concurrently with delivery of the products ordered. The second copy of the order form is retained at the point of shipment, and the triplicate copy is used for obtaining the signature of the retailer showing receipt of the goods in cases where delivery of the goods is made by plaintiff's own truck.

Operators of the delivery trucks also at times accept orders, which, when obtained, are handled and filled in the same manner as other orders.

In filling such orders, transportation of the goods from the bakery or distribution center outside the State of Indiana to the customer located in the State of Indiana, is in approximately 90% of the transactions made by plaintiff's own trucks, and in approximately 10% of the transactions by independent transportation companies. In case of delivery by plaintiff's truck, the driver takes along the original and third copies of the order, obtains the retailer's signature of delivery on the triplicate copy, which is returned to plaintiff's office from which the goods were sold and delivered, and the original copy is left with the retailer as his bill or invoice.

In case of shipment by an outside transportation company, a form entitled (at the top) "Uniform Domestic Straight Bill of Lading" is filled out in triplicate. A copy of such bill of lading form, filled in to show a hypothetical transaction, is attached hereto, marked "Exhibit C-1, C-2 and C-3" and made a part hereof. The original copy of this bill of lading (also entitled "shipping order") is delivered to and retained by the transportation company or its agent; the second copy (first carbon, also entitled "memorandum") remains at the office of the plaintiff; and the third copy (second carbon) is sent by mail direct to the purchaser of the goods, together with the invoice for the same.

Collection of payment from the customer for the products sold and delivered to him is made as follows:

In certain instances where delivery in Indiana is made by plaintiff's own truck, the invoice is taken to the purchaser by the driver when the goods are delivered, and the customer makes payment to the driver in the form of cash or checks which are returned by the driver to the

bakery or distribution center outside of Indiana from which the goods were furnished, and in other instances the Indiana customer pays plaintiff's salesman in Indiana in cash or by check when further orders are given when he calls at the store, which checks are forwarded by the salesman to the distribution center with which he is connected, pursuant to plaintiff's orders. Where delivery is made by an independent transportation company, the invoice is sent by mail to the customer, who sends check in payment thereof direct to plaintiff's bakery or distribution center from which the goods were furnished. In no case is the cash or checks representing payments for plaintiff's goods furnished from a point outside of the State of Indiana deposited or negotiated in said State.

All of plaintiff's customers in the State of Indiana who are served from points outside of the State of Indiana have knowledge that at the time of giving their orders that plaintiff operates no bakery in the State of Indiana; that the salesman who takes the order is working from the bakery or distribution center located outside of the State; and that the goods will be delivered from a bakery or distribution center located outside of the State of Indiana in the usual course of business.

The method of doing business pursued by plaintiff during the taxable period, as above described, was established and followed prior to enactment of the Gross Income Tax Act and its effective date of May 1, 1933, and is still pursued by plaintiff. The only material alteration in plaintiff's method of doing business within the State of Indiana was during the period of temporary existence of the Fort Wayne distribution center as hereinabove stated.

During the taxable period, plaintiff did not have any bakeries in the State of Indiana, and all bakery goods delivered to customers in Indiana came from bakeries outside of the State of Indiana, either directly or through the Indianapolis, Evansville, Fort Wayne or South Bend distribution centers as defined specifically above. In order to serve customers within the State of Indiana from points within the State of Indiana, plaintiff would have had to establish within the State of Indiana additional warehouses and offices, obtain additional trucks and equipment, and hire additional employees, and to otherwise entirely alter its method of doing business. Such a change would make necessary the double handling of goods now shipped direct and would delay delivery of semi-perishable goods.